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Publisher: Routledge

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Representation

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/rrep20>

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Version of record first published: 13 Apr 2011.

To cite this article: Anna Stilz (2011): ON THE RELATION BETWEEN DEMOCRACY AND RIGHTS, Representation, 47:1, 9-17

To link to this article: <http://dx.doi.org/10.1080/00344893.2011.550193>

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ON THE RELATION BETWEEN DEMOCRACY AND RIGHTS

Anna Stilz

In *Democratic Rights*, Corey Brettschneider argues that the ideal of democracy is not limited to mere participation in political procedures. Instead, it should be understood as based on certain substantive democratic values. Once we see that democracy is not simply a procedural but also a substantive ideal, Brettschneider holds that we will view the individual rights guaranteed in constitutional democracies in a different light. These rights are often taken to be grounded in moral principles that are independent of democracy. But on Brettschneider's value theory of democracy, guaranteeing certain substantive rights—those derived from the fundamental democratic values—expresses principles internal to democracy itself. On the value theory, substantive rights are not an external constraint on the will of the people. Instead, democracy grounds both the guarantee of substantive individual rights and the value of citizens' participation in political procedures. *Democratic Rights* is a wonderfully lucid book and the argument is both insightful and thought-provoking. It is a pleasure to have the opportunity to comment on Brettschneider's work.

I will begin by focusing my comments on some issues that arise in chapter 2 of Brettschneider's book, and then extend beyond these issues to consider questions raised by his view more generally. In what follows, I raise two objections to Brettschneider's approach. First, I argue that his critique of Habermas' co-originality thesis is based on a misreading and therefore has less force than Brettschneider believes it does. I argue that Habermas and Brettschneider are ultimately engaged in a very similar project—showing that substantive rights inhere in the ideal of democracy—though Brettschneider's elaboration of that project is in some ways more successful. Second, I argue that Brettschneider does not adequately show that rights derive from the ideal of *democracy*, rather than a separate ideal of legitimate state coercion. I also explore two strategies available to Brettschneider for answering the latter objection. The first derives citizens' substantive rights from their status as political participants, and would bring him closer to the proceduralist position he criticises. The second derives citizens' participatory rights from their status as legal subjects, and subsumes democracy in a wider ideal of state legitimacy. Despite these objections, I am largely sympathetic to the arguments and views articulated in Brettschneider's book.

1.

In chapter 2, Brettschneider argues that citizens' status as rulers in a democracy entitles them to claim individual rights based on the three core elements of his value theory of democracy—equality of interests, political autonomy, and reciprocity. The democratic rights grounded in these three values are substantive rights, not just rights of participation. After elaborating how the value theory works to ground substantive rights in general, Brettschneider closes by considering how two particular rights—to the rule of

Representation, Vol. 47, No. 1, 2011

ISSN 0034-4893 print/1749-4001 online/11/010009-09

© 2011 McDougall Trust, London DOI: 10.1080/00344893.2011.550193

law and to freedom of speech—might be argued for from the perspective of his value theory.

Brettschneider begins chapter 2 by highlighting a distinction he takes from Jürgen Habermas' work. When considering citizens as democratic rulers who claim rights, we ought to consider not just citizens in their capacity as the *authors* of the laws they live under, but also (and, for Brettschneider, I think, more fundamentally) as the *addressees* of these laws. As authors, citizens are law-makers. But as addressees, citizens are subject to a demand for obedience to law, and they are threatened with coercion by the state if they refuse to comply. Brettschneider argues that we must offer reasons to each addressee of the law that shows coercion in accordance with that law to be justifiable to him. It is this need to justify state coercion to each addressee that requires that we extend him substantive, and not merely procedural, rights.

Although he highlights Habermas' distinction between citizens as authors and as addressees, Brettschneider takes issue with Habermas' particular use of this distinction. For Brettschneider, Habermas attempts to derive the rights of citizens as *addressees* from the prior rights of citizens as *authors*, thereby prioritising one aspect of democratic rulership over the other. Specifically, Habermas thinks that citizens have those substantive rights as addressees that they would themselves agree to in an ideal democratic procedure. Brettschneider objects that this ultimately renders procedural rights more fundamental than substantive rights, and may even make substantive democratic rights insecure.

Brettschneider offers an example to show that substantive rights must instead be grounded independently of any procedures. He asks us to imagine 'Larry Legislator', a democratically elected representative in a regime that requires all its representatives to remain confined to a cell during their term in office. Brettschneider constructs the example so that being locked up has no bad effects on Larry's ability to participate democratically: he can communicate with the outside world and take part in democratic debates via a special machine, he has full access to information, and he is released at election time to campaign. But, according to Brettschneider, our intuition tells us that 'despite his freedom to participate in making laws, Larry is not living the democratic ideal' (2007: 31). The example of Larry is meant to show us two things: first, that simply guaranteeing participation rights is inadequate to ensure the full range of democratic rights, and second, that the scheme of substantive rights enforced in Larry's society falls short of the ideal of democracy (even though it may have been enacted in accordance with the proper procedures). Substantive rights are part of democracy itself, and we need a procedure-independent standard to determine the rights of legal addressees.

Since Larry Legislator plays a central role in establishing Brettschneider's main thesis that substantive rights are part of the ideal of democracy, I will begin by focusing on this example. In the first place, I think the example is premised on a misreading of Habermas, and therefore its force against a Habermasian view is ambiguous. Brettschneider reads Habermas as a proceduralist who believes that substantive rights are preconditions for democratic procedures, and that citizens are entitled to those preconditions that they would unanimously grant one another in an ideal deliberative procedure (for this reading, see 15–16). But I do not think we should grant Brettschneider's reading of Habermas.

Since the issues here are complex, I will briefly outline what I take to be Habermas' view about the relationship between substantive and procedural rights.* In my view, Habermas is not a democratic proceduralist: his co-originality thesis is instead much closer to Brettschneider's own position than Brettschneider makes out. Ultimately, both

Brettschneider and Habermas want to show that private rights are not external constraints on democracy, but are rather part of the ideal of democracy itself. Brettschneider fails to recognise this only by misinterpreting Habermas' co-originality thesis as a procedural ideal. In fact, Habermas does not make the protection of substantive rights contingent on their affirmation in a democratic procedure. Nor does he suggest that private autonomy rights are justified because they are material preconditions for citizens' democratic participation. Instead, like Brettschneider, Habermas builds the protection of substantive rights into his definition of democracy itself. According to Habermas, both procedural and substantive rights are equally fundamental to democracy and neither one grounds the other: 'a legal order is legitimate to the extent that it equally secures the co-original private and political autonomy of its citizens' (1996: 409). It is constitutive of a legitimately binding democratic procedure, for Habermas, that it provides a system of private rights that secures each individual's claim to 'the greatest possible measure of equal individual liberties' (1996: 122).

Habermas' argument that public and private autonomy rights are equally fundamental to democracy leans heavily on two philosophical concepts: the *idea of legal form*, which stipulates that citizens must regulate their interactions by general and equally applicable laws, and the *discourse principle*, which stipulates that valid laws must be ones all citizens could consent to in a rational discourse. It is the first idea that, for Habermas, is supposed to make private rights a precondition of democratic self-legislation: 'the legal medium as such presupposes rights that define the status of legal persons as bearers of rights' (1996: 119).

Habermas emphasises that the form of law through which modern societies coordinate their citizens' behaviour is significant for private autonomy because law allows us to comply from various motives, either as public-spirited communicative agents or as self-interested private actors (1996: 120). The legal medium is also abstract and general, leaving space for private liberty in areas it does not regulate. Within the realm of the legally permissible, individuals are free to do as they like and they do not have to give others mutually acceptable reasons for their private conduct. This allows persons some space to pursue their own private projects and life-plans within these external constraints. A system of law thus establishes the possibility of at least a minimal exercise of private personal liberty (Cohen 1999: 392).

Second, according to Habermas, laws are *legitimate* only if they meet the requirements imposed by the discourse principle, which holds that everyone affected by a law ought to be able to agree to it in an ideal rational discourse (1996: 107). One thing that Habermas takes to be clear is that no law could be justified to the participants in an ideal discourse if that law treated them unequally. For that reason, he argues it is an abstract, *a priori* requirement on any democratic legal state that it put into place a system of *equal* liberties. Therefore, whatever private liberties are granted must be extended to everyone in equal measure if a society is to count as democratic. Finally, Habermas argues that citizens themselves must apply the discourse principle to their system of rights: it is only through actual democratic discourses that citizens can make their needs and interests known to one another and that they can adequately judge whether all those affected could really consent to a proposed law. The discourse principle therefore also grounds a democratic procedure in which it can be applied, by citizens themselves, to law and policy. Institutionalising these discourses requires citizens to possess public autonomy rights (to political participation, free speech, and freedom of association), which enable them to participate in law-making. For Habermas, then, public autonomy and private autonomy are co-original, first, because the law makes possible

private liberties, and second, because the discourse principle requires that law be legitimate, which means these liberties must be granted equally and must be determined through a democratic process in which all participate. Like Brettschneider, Habermas makes substantive rights a constitutive part of the democratic ideal.

With all this in place, how might Habermas respond to the challenge posed by the Larry Legislator example? Whether the example has any force against Habermas depends on how the circumstances surrounding the example are fleshed out. Suppose that Larry is confined to a cell while his fellow citizens are left free to roam about. Then Habermas could argue that Larry's society is not properly democratic because it fails to satisfy his *a priori* requirement on a democratic system of rights: that liberties be distributed equally. If Habermas' co-originality argument is successful, then he has a rejoinder to the Larry example, at least if it involves inequality. Still, the example doesn't entirely fall flat, for I think it can be slightly revised to point out a crucial gap in Habermas' view. We might imagine that Larry's society is one in which each citizen is *equally* subject to confinement in a cell for a certain period of his life, while still retaining other important private liberties, like the right to marry, to own property, and to practise his or her religion. Still, each citizen is arbitrarily coerced by the state for a certain period. Such a society would seem to qualify as properly democratic on Habermas' view, since it provides a scheme of private autonomy rights and extends these rights equally to all citizens. Yet surely there is something wrong here. The particular scheme of rights this society provides fails to respect an interest—freedom from arbitrary confinement—that we rightly regard as fundamental. In my opinion, this shows that Habermas' argument for co-originality rests on moral premises that are too spare to do the work required of them. The ideals of legal form and the discourse principle are simply too minimal to identify the democratic liberties we intuitively think are important. Consider religious freedom, for example: it seems easy to imagine a system of abstract and general laws that applied equally to everyone, and established some private autonomy rights, but that still required religious conformity. Habermas may show that *some* scheme of private rights is a precondition for legitimate democratic legislation, since the rule of law and the discourse principle require it. But he hasn't shown that such a scheme must protect the particular interests we recognise as fundamental, especially since he concedes that the 'basic rights inscribed in the legal code ... must be *interpreted* and *given concrete shape* by a political legislature' (1996: 125).

Here, Brettschneider's version of the co-originality argument does better. He claims that substantive rights are not grounded in the purely formal ideas of the legal medium and rational discourse, but rather in a moral theory of justified coercion that he calls *democratic contractualism*. This theory is grounded in *substantive values*: equality of interests, political autonomy, and reciprocity. These democratic values help us to determine the proper limits of state coercion, and thereby to define basic rights. Coercion that cannot be given a justification consistent with the democratic values is coercion that infringes citizens' rights. This more substantive account allows us to rule out a society that arbitrarily confines each citizen as inconsistent with the democratic ideal, whereas Habermas' view cannot. So although the Larry Legislator example is not as fatal to Habermas' view as Brettschneider takes it to be, it still retains some force.

Brettschneider firmly contrasts his own account of democratic rights with a proceduralist view (which I have claimed he mistakenly attributes to Habermas). Whereas a proceduralist tries to make the case that private rights are necessary preconditions for a practice of legitimate democratic law-making, Brettschneider's value theory argues that we should

keep citizens' status as authors of law and their status as addressees of law distinct. For Brettschneider, these are simply two separate bases for rights: 'there is a principled basis for citizens' rights as addressees of law not rooted in an account of citizens as authors of law' (2007: 32). Private rights, for Brettschneider, are thus not derived from the importance of political participation; they are derived from the distinct interests of citizens as addressees of law, and especially from the need for a framework to justify state coercion. Thus, we might say that while the proceduralist opts for a 'one-track' model of rights, where substantive rights are grounded in their status as preconditions for the legitimate exercise of democratic self-legislation, Brettschneider goes for a 'two-track' model, where substantive rights are grounded separately in the interests of citizens as the addressees of coercive law, and are given equal status with procedural rights.

Brettschneider argues for the appeal of this two-track strategy in part by noting that while some citizens are unable or unwilling to participate in the democratic process (think of minors, resident aliens, tourists, and the politically apathetic), they still have substantive private rights in their capacity as addressees of law. This tells against the idea that the importance of private rights derives from their constitutive role in a democratic law-making process. Instead, people retain private rights even when they have nothing to do with a democratic law-making process. The rights of the addressees of law 'are distinct from, and often irrelevant to' (2007: 32), their political participation. Citizens' status as *authors* of law grounds their *procedural* rights, while their status as *addressees* of law grounds their *substantive* rights, and we should not grant one of these priority over the other.

All addressees of the law—minors, non-participating citizens, resident aliens, even tourists—are liable to state coercion, and for this reason they are entitled to be given good reasons for that coercion. For Brettschneider, this requires that we ensure the laws treat them 'in a way consistent with their status as free and equal rulers' (*ibid.*). We should adopt a Rawlsian principle of reciprocity that requires us to give a justification to each legal addressee, one that takes into account his particular social position, perspective, and point of view, and shows the law treats him as free and equal. This requires extending him substantive rights. Ideally, of course, citizens will also affirm these substantive rights through their democratic procedures, but for Brettschneider the rights are grounded in a separate ideal of the justification of state coercion, not in the democratic procedures themselves.

Brettschneider also argues that classical and non-controversial democratic rights, such as those against *ex post facto* laws and bills of attainder, are better explained by his democratic contractualist theory than by a proceduralist account. It is true that *ex post facto* laws and bills of attainder would allow factions to wield power undemocratically—as proceduralists often emphasise—but for Brettschneider that is not what is most fundamentally wrong with them. Instead, what is most objectionable is the way these measures treat legal addressees: they selectively punish legal subjects, they undermine subjects' ability to plan their lives securely, and they eliminate subjects' ability to have public access to the reasons that justify their coercion. In the case of free speech rights, another non-controversial democratic entitlement, Brettschneider similarly argues that these rights can be better accounted for by focusing on the claims of legal addressees. Although many thinkers justify free speech rights on the proceduralist ground that they aid democratic deliberation, Brettschneider contends that even citizens who do not vote or debate have equally important free speech rights in their capacity as *listeners* and as addressees of law. In chapters 4 to 6, Brettschneider extends this framework to argue that more controversial rights to privacy, against capital punishment, and to basic welfare are also owed to citizens in their capacity as legal addressees.

Let me summarise the argument so far. I have claimed that ultimately Brettschneider and Habermas are both 'co-originality' theorists who wish to ground substantive democratic rights in an ideal of democracy. But Brettschneider's version of the project improves on Habermas' by being better able to account for the private rights we generally take to be fundamental, since he builds substantive and not merely formal values into his derivation of democratic rights. I have also described how Brettschneider's approach to grounding substantive democratic rights appeals not to the preconditions of a legitimate democratic procedure, but instead to an independent ideal: that of justified state coercion. In the next section, however, I want to suggest that some aspects of Brettschneider's strategy may come at a cost to the co-originality project: in grounding substantive rights in an ideal of justified state coercion, it may be difficult to show that these rights are peculiarly *democratic*.

2.

Let me begin by invoking a non-normative, ordinary-language definition of democracy: a democracy is a political system in which all citizens authorise the law that applies to them through their participation together in democratic procedures. My question is the following: what is especially democratic—in this ordinary-language sense—about the rights of legal addressees? As Brettschneider emphasises by invoking the rights of minors, resident aliens, and tourists, legal addressees are often people who do *not* have the right to authorise law through democratic procedures. Indeed, some of these people may never gain such participation rights. So having participation rights in a state, it seems, is not a condition for having substantive private rights there. We might imagine a state composed almost entirely of people who were addressees and not legislators—a state where law was made by an autocrat or a small elite. It would seem that in such a state, however, all Brettschneider's arguments in favour of granting substantive rights would still apply. After all, people are coerced by the law in this state, and thus they would be owed certain private rights to justify that coercion. So nothing in the argument for substantive rights depends on a state's having a *democratic* political system. It therefore does not seem to be the democratic ideal—again, in the ordinary language sense of 'democratic'—that grounds citizens' substantive rights. Instead, these rights are grounded in another ideal altogether, the ideal of justified coercion through law, an ideal that applies to all states everywhere, even non-democratic ones.

It is clear that Brettschneider wishes to argue that substantive rights are grounded in an ideal of *democracy*, not in some separate ideal. But I do not believe he has the resources to ground this assertion. Brettschneider argues that substantive rights are grounded in citizens' status as rulers. For him, treating citizens as 'free and equal rulers' requires treating them as 'as if' rulers (those who could hypothetically consent to the state's laws), not 'real' rulers (those who actually have a say): 'the moral conception need not demand full political rights for all in order to be useful in determining when and how individuals rightly are coerced' (2007: 60). Consider, though, the case of a non-democratic government like a monarchy: the laws of this government address their subjects in the very same coercive fashion as laws in a democracy. If having substantive rights does not depend on having participation rights, then it would seem that the subjects of the monarch ought to be granted substantive rights too, for all the reasons Brettschneider cites. After all, the monarch's subjects are coerced by the law, so they should be 'as if' rulers. We could also easily imagine, I think, that a constitutional monarchy might offer robust protections of the various fundamental rights—to the rule of law, freedom of speech, privacy, fair punishment, and welfare

benefits—that Brettschneider argues are inherent in the ideal of democracy. If this line of thought is correct, then the substantive rights of legal addressees may rest on the mere fact of coercion through law—something that occurs in any legal state—and not on the particular mode of enacting legislation, through democratic procedures. In other words, these substantive rights are the rights of legal subjects generally and not of democratic citizens in particular.

Brettschneider wants us to accept that substantive rights are part of the ideal of democracy itself, not part of a distinct but valuable ideal of justified law. But the more he emphasises that substantive rights accrue to persons simply because of their status as coerced (regardless of whether they have the right to participate in making that law), the more difficult it becomes to see why substantive rights are part of a *democratic* ideal, in the ordinary sense that focuses on how the law is made. As I will now lay out, I see two potential resources in Brettschneider's text that might allow him to avoid or answer the criticism that substantive rights are grounded on an ideal distinct from that of democracy, namely the ideal of justified coercion through law. The first would be to backtrack and argue that the rights of legal addressees are not actually grounded separately from their rights of political participation, but are rather entailed by their political autonomy rights. This strategy would bring Brettschneider closer to the proceduralist position he criticises. The second is to claim that the *democratic* ideal is not self-standing, but is rather an implication of a broader and more fundamental commitment to justified state coercion. On this view, democratic participation rights are simply one part of a wider package of rights that must be granted to the legal subject in order to justify state authority. I actually think there are elements of both strategies in Brettschneider's book, though ultimately I am not sure which strategy he endorses (if either).

While the general thrust of Brettschneider's argument is to claim that the substantive rights of legal addressees are grounded independently of democratic participation, as I have claimed, there is one strain in his text that cuts against this two-track interpretation. He suggests that citizens' status as authors of the law implies that they *ought also* to have rights as addressees. The argument goes as follows: 'If citizens are deemed capable of making decisions for others on the basis of rights of political rule, it should follow that they are capable of making decisions for themselves in the most important matters of their own personal lives' (2007: 31). And again:

[P]olitical freedom of the type Larry [Legislator] enjoys normatively presupposes some personal freedom of the type he is denied. Like those who are denied the right to marry, any political freedom Larry enjoys would be rendered hollow by his lack of personal freedom. (2007: 77)

The idea here seems to be that adopting democratic procedures indicates a kind of respect for the judgment of each citizen. If individual citizens were not accorded respect as decision-makers, then adopting democratic procedures would make no sense, since these procedures could be expected to lead to foolish and unwise decisions. But if individual citizens are good decision-makers in public life, then they ought to be accorded this respect in their private affairs as well. For how can one be taken to be a good judge for others but a bad judge for oneself?

I don't quite know what to make of this strain of Brettschneider's argument, since it cuts against his official position that the rights of citizens as addressees do not depend on their inclusion in political participation (and thus that minors, resident aliens, tourists, and

the politically apathetic have these substantive rights). One can also think of various challenges to this view: for example, perhaps democratic procedures show respect for citizens' judgment in their *collective*, rather than their individual, capacity. Aristotle's 'many minds' argument may be such a view: he argues that the collective judgment of the democratic many is superior to the judgment of the wisest man among them. If this were true, then respecting an individual's judgment as a member of a ruling sovereign body might not imply that we ought to expect his decision-making capacity in private life. I don't mean to defend this particular view of democracy, only to point out that Brettschneider's brief remark that our respect for Larry's judgment qua legislator implies our respect for his judgment in private life needs further development, though it is an interesting and thought-provoking claim. One virtue of this particular strain of Brettschneider's argument is that—if further developed—it might enable him to avoid the charge I have been trying to argue: that the substantive rights that he claims are part of the ideal of democracy are instead part of a separate ideal of justified coercion through law. When further developed, this argument might show that adopting democratic procedures commits us to recognising private rights, since it presupposes a foundational commitment to respect for individual judgment that has implications for rights as well. Taking this view, however, would require conceding that the rights of legal addressees are not fully distinct from the rights of legal authors. Instead, legal authorship is the fundamental source of all democratic rights, but our respect for the judgment of citizens as legislators entails that they be granted private rights too. What to say about the private rights of resident aliens and tourists remains a difficult question on this view.

The second strategy that Brettschneider might use to respond to the worry that substantive rights are not part of the ideal of democracy would be to make democracy itself part of a wider ideal of the legitimacy of state coercion. Brettschneider suggests that state coercion is justifiable to citizens only if it respects two principles: the principle of *democracy's public reason*, and the *inclusion principle*. The principle of *democracy's public reason* suggests that certain substantive rights are necessary in order for state coercion to be legitimate, and that the particular rights to be granted are to be determined in terms of the three core democratic values—equality of interests, political autonomy, and reciprocity—that he outlines in chapter 1. Since political autonomy indicates the need for democratic procedures, this might be read as suggesting that democratic voting is a necessary condition on justified state coercion. The inclusion principle also claims that in order for state coercion to be justified, we must examine its impact on specific individuals by asking what this individual could reasonably accept if she embraced the core values of democracy. Here again, it seems that democracy itself is a condition on justified state coercion.

Thus, the other way that Brettschneider might avoid my criticism that substantive rights are not grounded in the ideal of democracy (in the ordinary-language sense of the term) would be to claim that the ideal of democracy is itself only a specific instance of a wider normative theory in which it is subsumed: the ideal of justified state coercion. Taking this strategy, like the earlier one, would concede that the rights of authors and addressees of law are not derived from two separate and distinct values, but rather both spring from a single fundamental taproot. On this strategy, the rights of legal addressees are more basic than the rights of legal authorship, which can be derived from them. The subjects of a constitutional monarch, in their capacity as addressees of law, would also be owed procedural rights: the monarch should democratise the state in order to allow his subjects a say in the laws under which they live. Otherwise his coercion of them as legal subjects is not justified.

On this approach, then, anyone subjected to coercion by the state is owed procedural rights as part of a broader package of entitlements necessary to legitimise state authority. For this reason, Brettschneider would have to retract his assertion that ‘the moral conception need not demand full political rights for all in order to be useful in determining when and how individuals are rightly coerced’ (2007: 60). Each person subject to coercion by the state would be owed democratic rights, since these rights are part of an overall package of rights that are necessary to justify its rule.

In short, I think that Brettschneider’s two-track strategy for showing that substantive rights are part of the ideal of democracy is an unstable one. For at first blush, it appears to leave the source of substantive rights unconnected to the idea of democracy in the ordinary-language sense, and grounded instead in a separate ideal of justified state coercion. To overcome this objection, one must show how these two ideals are *connected*, and that means conceding that one of them—the idea of democracy as a political procedure or the idea of justified state coercion—is the more fundamental idea that implies the other. Either method of connecting the two ideals would, I think, entail some revisions in Brettschneider’s project.

To conclude, however, I want to emphasise again the richness and value of Brettschneider’s work and to express my deep sympathy with the overall aim of showing that private rights and democracy are not opposed to one another. This is an idea that I think is of great value. I have learned much from Brettschneider’s work, and my criticisms spring only from a desire to see his fundamental approach succeed.

NOTE

- * Habermas’s writings on co-originality are dense and sometimes difficult to follow. I have been aided in my understanding of his argument by Cohen (1999) and Rummens (2006).

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